United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

74-2344

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P/S

To be argued by
EDMUND S. PURVES

In The

United States Court of Appeals

For The Second Circuit

SIDNEY N. ROSENTHAL,

Plaintiff-Appellant,

- against -

EMANUEL, DEETJEN & CO., HEINZ BIEL, JOHN R. McDONNELL, PEYTON KNIGHT, JEAN-FRANCOIS DeCHARRIERE, WILLIAM G. FALLON, ROBERT P. MAHUSKE, PETER McGEE, JOSEPH TARANGELO, ESTATE OF ANDREW WILLIAMS, ESTATE OF JOHN P. FAGEN, ESTATE OF RUDOLPH DEETJEN, CARL DEETJEN, MURIEL DEETJEN, RUDOLPH H. DEETJEN, JR., PAUL PORZELT, CHARLES SCHUBERT, BRIAN O'NEILL, THOMAS J. STEVENSON, JR., ALBERT EMANUEL, II,

Defendants-Appellees.

On Appeal from Order of the United States District Court for the Southern District of New York

BRIEF AND APPENDIX FOR APPELLEES

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TABLE OF CONTENTS

TABLE OF CASES

INDEX TO APPENDIX

ISSUE PRESENTED FOR REVIEW

Is the amount of the claim of a former limited partner of a limited partnership a matter which is required to be submitted to arbitration under the arbitration clause of the agreement of limited partnership?

ARGUMENT

THERE IS A CLEAR DISPUTE AS TO THE VALUE OF APPELLANT'S INTEREST IN THE LIMITED PARTNERSHIP AND THIS IS REQUIRED TO BE SETTLED BY ARBITRATION.

A. Claims Arising Prior to August 31, 1970.

The main thrust of appellant's argument is that there is no dispute between the parties which requires arbitration. In Point I of his brief appellant concludes that since the appellees have not come forward with any proof that there are any unpaid creditors whose claims arose prior to August 31, 1970, that there is no dispute (Appellant's brief pp.5-6). Not only is this conclusion clearly contradicted by the statement in the motion papers of appellees (Appellant's App. p.5a) but the District Court below had no trouble finding a dispute existed.

There is no requirement at this stage of the proceedings to come forward with proof as to what these claims are. Merely putting at issue the allegations of the complaint is sufficient to show a dispute between the parties. Appellant has in effect conceded this possibility as in his answering affirmation he stated that if there were any such claims, the court should hold appropriate amounts in reserve (Appellant's App. p.12a). Such statement is clearly at variance with the argument now presented to the court. If there are such claims, why isn't an arbitrator or a panel of arbitrators the proper body to

determine their validity' It is possible that the defenses raised by the appellees could be resolved in favor of the appellant but that is not the issue in the instant case. The issue is simply whether there is a dispute, not whether the position of the appellees is meritorious.

Appellant appears to rely on the case of Necchi v. Necchi Seving Machine Sales Corp., 348 F.2d 693 (2nd Cir. 1965), cert. denied 383 U.S. 909. That case held that it was for the court to decide whether there is an arbitrable dispute. This holding was clearly followed by the court below which recognized that there is a dispute as to the amount of appellant's claim and that this dispute is covered by the broad arbitration clause. Apparently confusing pleading with proof, appellant would now urge on this court that his conclusions should be accepted while those of the appellees should not. No authority has been cited by appellant for this position.

He further attempts to avoid the decision of the court below by alleging that it "begs the question". (Appellant's brief p.8). Quite to the contrary, it is appellant who begs the question. Were the courts to require proof of every allegation in a complaint and support for every denial or answer thereto in a preliminary procedural matter, these would in effect be a decision on the merits when none was contemplated

or required. In Necchi, supra, this court decided which issues were arbitrable and which were not without deciding whether there was any merit to them. Similarly, on the hearing of the motion to arbitration, the court below found a dispute without asking for evidence supporting appellees' claim that there was one.

As to appellant's argument that if there are claims which have not been paid then a reserve should be set up (Appellant's brief p.8), it is submitted that this could just as well be handled by an arbitrator. This is an incidental part of appellant's claim and is therefore covered by the arbitration clause.

The case cited by appellant, Affiliated Food Distributors, Inc. v. Local Union No.229, 483 (3rd Cir. 1973), cert. denied 415 U.S. 916, (Appellant's brief p.6) held that the arbitration clause applied only to employee grievances but not to damages. There the clause was clearly limited to grievances whereas in the present case the arbitration clause is extremely broad.

While appellant has tried to avoid arbitration by attempting to show by affidavit only, and without evidence, that there really are no valid issues and, therefore, no dispute, he cannot avoid the clear language of the court below:

> "This controversy arises out of or relates to the contract, or its breach. Despite the declaratory nature of plaintiff's complaint, the dispute is basically one for a sum of money owed to a partner upon withdrawal from the partnership.

> "This provision, along with the broad arbitration clause, indicates that the parties intended that disputes concerning the determination and method of payment to withdrawing partners be sent to arbitration. The controversy is therefore one which arises out of the contractual relationship of the parties." (Appellant's Appendix p.5a)

B. Claims Arising After August 31, 1970.

In his complaint (Appellees' App. p.3) it is alleged that appellees had made "provision for payment of all claims arising subsequent to August 31, 1970 (e.g., legal and accounting fees pertaining to the liquidation of Emanuel, Deetjen & Co and loans to partners)".

Appellees dispute this and claim that appellant would be liable for his pro rata share (Appellant's App. p.8a). Appellant states that as a matter of law appellant is not liable for such claims and therefore there is no dispute. It is submitted that whether or not appellant is right as a matter of law, this is a question of law which should be submitted to arbitration. Certainly the arbitrator is not precluded by the language of this clause from determining the legal effect of appellant's status on his liability for such claims. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). In that case the court was faced with the question as to whether or not the question of fraud in the inducement of the contract containing a broad arbitration provision was a matter for the court or for

the arbitrator. In construing a broad arbitration clause similar to the one in the instant case, the court held that since legal issues were not excluded the arbitrator could and should decide the issue of fraud in the inducement. The same reasoning should apply here.

If the partnership had continued as an operating entity after appellant withdrew, then appellant might well be correct that he is not liable for such claims. However, reference is made in the complaint to the expenses of liquidation. This was clearly contemplated when the agreement of sale of the assets of the partnership was entered into while appellant was a limited partner. In fact, appellant recognizes that the sale took place less than two weeks after his withdrawal became effective (Appellant's App. p.12a). While claims may have in effect arisen after August 31, 1970, they would for all practical purposes relate back to the operation of the partnership while appellant was still a limited partner. A final determination of his interest would take this fact into account and an appropriate reserve would be set up against his share for all the expenses of winding up the partnership. Appellant, of course, has every right to contest this determination. But this is a matter which the arbitrator should decide and not the court.

Conclusion.

The order of the district court granting the motion to stay this action pending arbitration should be affirmed and the appellant directed to proceed to arbitration. There is no question that a valid controversy exists and that arbitration is the sole means of resolving it.

Respectfully submitted,

EDMUND S. PURVES
Attorney for Appellees

January 13, 1975

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIDNEY N. ROSENTHAL,

Plaintiff

-against-

EMANUEL, DEETJEN & CO., HEINZ BIEL, JOHN R. McDONNELL, PEYTON KNIGHT, JEAN-FRANCOIS DeCHARRIERE, WILLIAM G. FALLON, ROBERT P. MAHUSKE, PETER McGEE, JOSEPH TARANGELO, ESTATE OF ANDREW WILLIAMS, ESTATE OF JOHN P. FAGEN, ESTATE OF RUDOLPH DEETJEN, CARL DEETJEN, MURIEL DEETJEN, RUDOLPH H. DEETJEN, JR., PAUL PORZELT, CHARLES SCHUBERT, BRIAN O'NEILL, THOMAS J. STEVENSON, JR., ALBERT EMANUELL II,

Defendants.

CIVIL ACTION NO. 74-123

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, SIDNEY N. ROSENTHAL, complaining of the defendants, by his attorney, Murray M. Weinstein, alleges:

1. Plaintiff at all times hereinafter mentioned was and still is a resident of the State of Florida.

2. Defendant, Emanuel, Deetjen & Co., at all times hereinafter mentioned was and still is a New York limited partnership with its last known office address at 120 Broadway, New York, N.Y. Said limited partnership is now in liquidation.

3. On information and belief the following named defendants were general partners of Emanuel, Deetjen & Co. as of August 31, 1970: Heinz Biel, John McDonnell, Peyton Knight, Jean-Francois DeCharriere, William G. Fallon, Robert P. Mahuske, Peter McGee, Joseph Tarangelo, Estate of Andrew Williams, Estate of John P. Fagen, and the Estate of Rudolph Deetjen; the following named defendants were limited partners of Emanuel, Deetjen & Co.

as of August 31, 1970: Carl Deetjen, Muriel Deetjen, Rudolph H. Deetjen, Jr., Paul Porzelt, Charles Schubert, Brian O'Neill, Thomas J. Stevenson, Jr., and Albert Emanuell II.

4. This an action for a declaratory judgment pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201 and 2202, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

5. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

6. That on or about November 1, 1967, plaintiff entered into a limited partnership agreement with the partners of Emanuel, Deetjen & Co. A copy of said agreement, as amended through October 1, 1968, is attached hereto as Exhibit A.

7. That plaintiff, as a limited partner, contributed the sum of $100,000.00 as his initial contribution to the capital of the defendant, Emanuel, Deetjen & Co.

8. That on or about February 11, 1970, and in accordance with the provisions of the limited partnership agreement, plaintiff gave notice of his withdrawal as a limited partner, said termination to become effective c August 31, 1970.

9. That plaintiff, having terminated his limited partnership with the defendant, Emanuel, Deetjen & Co., became a general creditor thereof, on August 31, 1970, to the extent of the amount in his capital account on said date, including interest thereon at the rate of six (6%) per cent per annum, as provided for in paragraph twenty-two of the partnership agreement.

10. That defendant, Emanuel, Deetjen & Co., now in liquidation, acknowledges that plaintiff retired as a limited partner on August 31, 1970, and that the value of his capital account on that date was $38,931.28. See copy of financial statement of Emanuel, Deetjen & Co. (In Liquidation), Partners Accounts as of

April 30, 1973, attached hereto as Exhibit B.

11. That paragraph twenty-two of the limited partnership agreement provides that estimated payments on account of interest charges shall be made at the end of each calendar month from the date of withdrawal, until the said purchase price, with interest thereon, has been fully paid. No such payments of interest have been made to the plaintiff from the date of his withdrawal, on August 31, 1970, to the present.

12. That, upon information and belief, the defendant, Emanuel, Deetjen & Co. has paid all claims of creditors arising prior to August 31, 1970 except the claim of the plaintiff herein.

13. That, upon information and belief, the defendant, Emanuel, Deetjen & Co. has made provision for the payment of creditors' claims arising subsequent to August 31, 1970 (e.g., legal and accounting fees pertaining to the liquidation of Emanuel, Deetjen & Co., and loans to partners).

14. That, upon information and belief, there are insufficient funds of the defendant, Emanuel, Deetjen & Co. to pay in full those creditors whose claims arose subsequent to August 31, 1970, the claim of the plaintiff herein, and the capital contributions of the existing partners of Emanuel, Deetjen & Co.; and plaintiff is entitled to be paid the full amount of his claim before any funds are paid out to the partners of Emanuel, Deetjen & Co. or to creditors whose claims arose subsequent to August 31, 1970.

15. Plaintiff seeks a determination by this Court as to his status as a creditor of Emanuel, Deetjen & Co. on August 31, 1970, to the extent of $38,931.28. Plaintiff's claim, as a creditor, is presently subject to risk of loss by virtue of the

liquidation of Emanuel, Deetjen & Co. The defendant, Emanuel, Deetjen & Co. has admitted that plaintiff retired from Emanuel, Deetjen & Co. on August 31, 1970, and that he is entitled to the sum demanded by him (but not as a creditor). A declaration by this Court as to plaintiff's standing as a creditor of Emanuel, Deetjen & Co. as of August 31, 1970, and that he is entitled to payment on said claim, plus interest thereon, before any monies are paid to the present partners of Emanuel, Deetjen & Co. or to any creditors whose claims arose subsequent to August 31, 1970, will resolve the entire controversy between the parties.

WHEREFORE, plaintiff, SIDNEY N. ROSENTHAL, demands

1. That the Court declare the rights and legal relations of the parties to the subject matter here in controversy, particularly with respect to the status of plaintiff as a creditor of the defendant, Emanuel, Deetjen & Co. on August 31, 1970, and the priority of payment of his claim.

2. That the Court declare that plaintiff, as a creditor of Emanuel, Deetjen & Co., is entitled to immediate payment from the said defendant of $38,931.28, as set forth and agreed upon by defendant as the amount of plaintiff's claim against it, plus interest from August 31, 1970; and that said amount is to be paid to plaintiff before any monies are paid to the general or limited partners of Emanuel, Deetjen & Co. or to creditors of said defendant, whose claims arose subsequent to August 31, 1970.

3. That the Court declare that the defendant, Emanuel, Deetjen & Co. make immediate payment to plaintiff on account of the interest on his claim, for the period August 31, 1970 to date, as provided for in the partnership agreement, and that the defendant continue to make estimated monthly payments to the plaintiff until he has been paid his claim in full.

4. That the Court delcare that if the funds of the defendant, Emanuel, Deetjen & Co. (In Liquidation) are insufficient to pay to plaintiff the sum of $38,931.28, plus interest, that the individual partners of Emanuel, Deetjen & Co., be adjudged liable to plaintiff for said amount.

5. Judgment for costs, and for such other relief as the Court may deem proper.

Dated: December 26, 1973.

Murray M. Weinstein

MURRAY M. WEINSTEIN
Attorney for Plaintiff
217 Broadway
New York, N.Y. 10007

VERIFICATION

STATE OF NEW YORK)
)ss:
COUNTY OF NEW YORK)

MURRAY M. WEINSTEIN, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff herein, and have my offices at 217 Broadway, New York, N.Y.; I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true; the reason why this verification is made by me instead of by the plaintiff, is because the plaintiff resides in the State of Florida, and is not present in the Southern District of New York, in which District your deponent has his office. The grounds of my belief as to all matters in the complaint not stated upon my knowledge, are as follows: telephone conversations with the plaintiff, correspondence and other written instruments, documents and papers obtained by me from the plaintiff and other persons, and my general investigation of the facts of this case.

Murray M. Weinstein
MURRAY M. WEINSTEIN

Sworn to and subscribed before
me this 26th day of December, 1973.

Loretta J. Cortese
Notary Public

LORETTA J. CORTESE
Notary Public, State of New York
No. 41-5825382
Qualified in Queens County
Commission Expires March 30, 1974

US COURT OF APPEALS

ROSENTHAL,
Plaintiff-Appellant,

- against -

DEETJEN, CO., et al,
Defendant-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the **15th** *day of* **January** *1975 at* **217 Broadway, New York**

deponent served the annexed Appellees Brief *upon*

Murry M. Weinstein

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this **15th**
day of **January** *1975*

Robert T. Brin

James Steele
JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975